

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 14, 2003

IN RE:

BELLSOUTH'S TARIFF TO INTRODUCE  
WELCOMING REWARD PROGRAM

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DOCKET NO.  
03-00060

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ORDER DISMISSING PETITION TO SUSPEND TARIFF

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This matter came before Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on March 3, 2003 for consideration of the *Tariff to Introduce the BellSouth Welcoming Rewards Program* (the "*Tariff*") initially submitted by BellSouth Telecommunications, Inc. ("BellSouth") on January 3, 2003; the *Petition to Suspend Tariff and Open a Contested Case Proceeding* ("*Petition*") filed by a coalition of competitive local exchange carriers (the "CLEC Coalition"<sup>1</sup>) on January 22, 2003; and the *Complaint and Petition to Intervene* ("*Intervention*") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") on January 31, 2003.

**Background**

BellSouth submitted the first of several versions of the *Tariff* on January 3, 2003<sup>2</sup> to become effective February 3, 2003 and continue until May 2, 2003. The *Tariff*, as submitted on January

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<sup>1</sup> The CLEC Coalition is identified in the Petition as including Access Integrated Networks, Inc., Cinergy Communications Company, Xspedius Corporation, and AT&T Communications of the South Central States, Inc.

<sup>2</sup> The *Tariff* was received by the Tennessee Regulatory Authority on January 3, 2003 but was not filed in the Docket room until January 23, 2003.

3, 2003, introduced the “Welcoming Reward Program” for new BellSouth business customers located in Rate Group 5.<sup>3</sup> To qualify under the *Tariff* as submitted on January 3, 2003, new business customers were required to: 1) be located in Rate Group 5; 2) have two or more lines per location; 3) have aggregate annual billing of not more than thirty-six thousand dollars (\$36,000.00) annually at the time of enrollment; and 4) sign a twelve (12) month term contract. New business customers who met those requirements were to receive a reward in the form of a one hundred dollar (\$100) credit per new line per location. The *Tariff* as submitted on January 3, 2003, provided that the one hundred dollar reward would appear as a one-time credit on the business customer’s bill. Additional lines subsequently added by the customer during the *Tariff* period were not eligible for the reward.

On January 22, 2003, the CLEC Coalition filed its *Petition* requesting that the Authority suspend the *Tariff* and open a contested case proceeding to investigate whether the *Tariff* was just and reasonable and otherwise consistent with state law. The *Petition* alleged that the *Tariff*, as submitted on January 3, 2003, was discriminatory in that it excluded existing BellSouth customers; anti-competitive in that it locked customers into what the CLEC Coalition characterized as long-term commitments with early termination penalties; and that it would create a price squeeze if the wholesale discount was not applicable to resale of the *Tariff*.<sup>4</sup>

On January 31, 2003, the CAPD, citing state and federal law, filed its *Intervention* alleging that the *Tariff*, as filed on January 3, 2003, was unjustly discriminatory towards existing BellSouth customers and that it created a price squeeze because the one hundred dollar (\$100) rewards could not be resold under the *Tariff*.<sup>5</sup>

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<sup>3</sup> Rate Group 5 consists of all exchanges located in the metropolitan calling areas of Nashville and Memphis.

<sup>4</sup> *Petition*, pp.1, 4 (January 22, 2003).

<sup>5</sup> *Intervention*, pp. 2-4 (January 31, 2003).

*BellSouth Telecommunications, Inc.'s Response to Request to Suspend BellSouth Tariff* ("Response") was also filed on January 31, 2003. In its *Response*, BellSouth stated that the *Tariff* was neither discriminatory nor anti-competitive and that BellSouth must be free to offer discounted pricing or incentive rewards to discrete groups of customers including customers it has lost to competition.<sup>6</sup> BellSouth also pointed out in its *Response* that, contrary to the CLEC Coalition's allegations, the *Tariff*, as submitted on January 3, 2003, was not limited to former CLEC customers but also included business customers relocating from out of state to rate group 5 areas in Tennessee.<sup>7</sup> BellSouth argued in its *Response* that the twelve-month term provided for in the *Tariff*, as submitted on January 3, 2003, and the corresponding early-termination liability provisions contained in the *Tariff* were fully consistent with previously approved tariffs and termination liability provisions.<sup>8</sup> BellSouth argued further in its *Response* that the *Tariff*, as submitted on January 3, 2003, did not create a price squeeze because the *Tariff's* promotional period ran no more than ninety (90) days and the promotional prices it contained did not constitute retail prices.<sup>9</sup> BellSouth also pointed in its *Response* to the CLEC Coalition's ability to resell the underlying services in the *Tariff*, as submitted on January 3, 2003, in combination with their own credits or other rewards.<sup>10</sup> BellSouth also referenced the CLEC Coalition's ability to use unbundled network elements which are priced lower than the retail rates for the elements contained in the *Tariff* submitted on January 3, 2003.<sup>11</sup>

The *Tariff*, the *Petition*, and the *Intervention*, were first considered at the regularly scheduled Authority conference held on February 3, 2003. Guy Hicks, Esq. appeared on behalf of

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<sup>6</sup> *Response*, p. 2 (January 31, 2003).

<sup>7</sup> *Id.*, p. 3 (January 31, 2003).

<sup>8</sup> *Id.*, pp. 12-13 (January 31, 2003).

<sup>9</sup> *Id.*, p. 13 (January 31, 2003).

<sup>10</sup> *Id.*, p. 14 (January 31, 2003).

<sup>11</sup> *Id.*, p. 15 (January 31, 2003).

BellSouth; Henry Walker, Esq. of Boulton, Cummings, Conners & Berry, PLC appeared on behalf of the CLEC Coalition; and Timothy Phillips, Esq. and Joe Shirley, Esq. appeared on behalf of the CAPD. Thereafter a majority<sup>12</sup> voted:

1. To accept a revision to the *Tariff* such that subscribing customers could terminate their agreement with BellSouth under the *Tariff* after ninety (90) days without termination liability;
2. To allow the *Tariff*, as modified, to go into effect; and
3. To place this matter on the agenda for the regularly scheduled Authority Conference to be held on February 18, 2003 to determine whether to convene a contested case.

On February 5, 2003, BellSouth filed its first revision to the *Tariff*. Contrary to the Authority's order of February 3, 2003 (issued on February 14, 2003), the first revision to the *Tariff* removed termination charges during the first ninety days of the contract rather than allowing subscribing customers to terminate their agreements with BellSouth after ninety days without termination liability. The *Tariff*, *Petition*, and *Intervention* were again considered at the regularly scheduled Authority Conference held on February 18, 2003. Guy Hicks, Esq. appeared on behalf of BellSouth; Henry Walker, Esq. of Boulton, Cummings, Conners & Berry, PLC appeared on behalf of the CLEC Coalition; Joe Shirley, Esq. appeared on behalf of the CAPD; and Joe Werner appeared on behalf of the TRA's Telecommunications Division. After some discussion between the parties and the voting panel, BellSouth agreed to file by February 19, 2003, a revised tariff consistent with the TRA's order from the February 3, 2003 Authority Conference.<sup>13</sup> Also at the February 18, 2003 Authority Conference BellSouth requested that it be allowed to submit a tariff further modifying the Welcoming Reward Program addressing the

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<sup>12</sup> Director Ron Jones declined to vote with the Majority.

<sup>13</sup> Transcript of Authority Conference, p. 69 (February 18, 2003). With the entry of this Order, the *Tariff*, as modified by BellSouth's February 19, 2003 revised filing, is no longer in effect.

issues remaining in this Docket including whether BellSouth's *Tariff* is a short-term or long-term promotion, whether the promotional discount offered in the *Tariff* should be available for resale, and the appropriateness of applying the promotional discount to the first ninety days of the contract period or over the life of the twelve-month contract for the purpose of price-floor analysis.<sup>14</sup>

On February 19, 2003, BellSouth filed a second revision to the *Tariff* consistent with the TRA's order from the February 3, 2003 Authority Conference which contained language stating that there would be no termination liability for customers canceling their contracts after ninety days.

On February 20, 2003, Chairman Sara Kyle filed a *Notice of Schedule* requesting BellSouth to file its proposed tariff by February 21, 2003, and for the CLEC Coalition and the CAPD to file any response to the proposed tariff by February 25, 2003.

On February 21, 2003, BellSouth filed a third revision to the *Tariff* with an effective date of March 3, 2003. The third revision was submitted together with a cover letter explaining BellSouth's view of the impact of the proposed revisions. In the letter BellSouth pointed out that if the latest revisions were implemented they would work:

- (1) to lengthen the duration of the program to clearly exceed 90 days by stating that '[B]eginning February 3, 2003 and continuing until May 30, 2003, qualifying business customers with locations in Rate Group 5 may enroll in this Program . . .';
- (2) to extend the period during which rewards are received by end users by stating that '[T]he Reward will appear as a one-time credit in the OC&C section of the Subscriber's bill in the 4<sup>th</sup> or 5<sup>th</sup> subsequent billing period, usually within 120-150 days, and to require the end user to maintain such lines through the 4<sup>th</sup> billing period in order to receive the reward by stating that the reward will be '\$100 per new line/per

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<sup>14</sup> Transcript of Authority Conference, pp. 64, 68-69 (February 18, 2003).

location at the time BellSouth becomes local service provider and retained through 4<sup>th</sup> billing period;” and

- (3) to make both the underlying service and the bill credit available to resellers at the wholesale discount by stating that “[T]his Program, as well as the \$100 Reward described below, is available for resale at the wholesale discount . . . .”<sup>15</sup>

The termination charges contained in the original submission of the *Tariff* of January 3, 2003 were re-incorporated into this third revision.<sup>16</sup> Per its agreement stated at the February 18, 2003 Authority Conference to address several issues remaining in this Docket, BellSouth stated in its submission that, given the changes noted above, the *Tariff*, as filed on February 21, 2003, would be a long-term promotion for purposes of resale and that the resale of the *Tariff* would be available to resellers at the wholesale discount including the 100 dollar credit.<sup>17</sup>

The *Response of CLEC Coalition to Amended Tariff* (“*CLEC Coalition Response*”) was filed on February 25, 2003. In its response the CLEC Coalition conceded that its concerns regarding the appropriate discount for resale of the *Tariff* were addressed by the third revision.<sup>18</sup> However, the CLEC Coalition reiterated its objections to making the *Tariff* available to new customers while excluding existing customers stating that for all relevant purposes these two types of customers are identical.<sup>19</sup> The CLEC Coalition also stated in its response that the real purpose of the *Tariff* is to “damage the company’s competitors.”<sup>20</sup> The CLEC Coalition concluded in its response that issues of discrimination and anti-competitive conduct remain unresolved and need to be addressed.<sup>21</sup>

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<sup>15</sup> Letter from Guy Hicks, General Counsel, BellSouth Telecommunications, Inc., to Sara Kyle, Chairman, Tennessee Regulatory Authority, pp. 1-2 (February 21, 2003).

<sup>16</sup> *Id.*, p. 2 (February 21, 2003).

<sup>17</sup> *Id.*

<sup>18</sup> *CLEC Coalition Response*, p. 1 (February 25, 2003).

<sup>19</sup> *Id.*, p. 2 (February 25, 2003).

<sup>20</sup> *Id.*, p. 3 (February 25, 2003).

<sup>21</sup> *Id.*

The CAPD also responded to BellSouth's third revision to the *Tariff* with its *Attorney General's Response to Proposal From BellSouth* ("CAPD Response") which was filed on February 25, 2003. With its response the CAPD maintained that most issues raised by the CAPD in their *Intervention* were not resolved by the third revision to the *Tariff*.<sup>22</sup> However, the CAPD acknowledged that its original concerns raised in the *Intervention* regarding whether the *Tariff* unreasonably locks customers into long-term service commitments were significantly mitigated by the third revision to the *Tariff*.<sup>23</sup> The CAPD also acknowledged that the third revision to the *Tariff* mooted its concerns regarding whether the *Tariff* violates BellSouth's duty to offer for resale at established wholesale discount rates any telecommunications service that it provides to telecommunications customers who are not telecommunications carriers.<sup>24</sup> The CAPD maintained that the *Tariff* unjustly discriminates between new business customers and other business customers.<sup>25</sup> The CAPD argued that the distinction between new business customers and other business customers results in a greater wholesale price for resellers than the retail price paid by BellSouth's retail customers and otherwise constitutes an unreasonable restriction on resale.<sup>26</sup> The CAPD also stated in its response that BellSouth's reinstatement of termination charges for cancellation of service after ninety days in the third revision to the *Tariff* resurrected concerns originally noted in the *Intervention*.<sup>27</sup> The CAPD also reiterated its argument that the third revision to the *Tariff* did not resolve its concern that the *Tariff* unreasonably inflates a competitor's "customer acquisition costs" because "competitors cannot effectively resell the promotional rates to their targeted customer group, i.e., BellSouth's existing customers."<sup>28</sup>

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<sup>22</sup> CAPD Response, p. 2 (February 25, 2003).

<sup>23</sup> *Id.*, p. 3 (February 25, 2003).

<sup>24</sup> *Id.*, p. 3-4 (February 25, 2003).

<sup>25</sup> *Id.*, p. 4 (February 25, 2003).

<sup>26</sup> *Id.*, p. 5 (February 25, 2003).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, p. 6 (February 25, 2003).

The CAPD also pointed out in its response that a predatory-pricing issue is presented by the third revision to the *Tariff* in that under its terms a retail customer may be able to purchase basic business local service at a price below the statutory price floor.<sup>29</sup>

The *Tariff*, *Petition*, and *Intervention* as well as the *CLEC Coalition Response*, the *CAPD Response* and the *Reply of BellSouth Telecommunications, Inc. to Comments Regarding Substitute Tariff*<sup>30</sup> were considered at the regularly scheduled Authority Conference held on March 3, 2003. Joelle Phillips, Esq. appeared on behalf of BellSouth; Henry Walker, Esq. of Boulton, Cummings, Conners & Berry, PLC appeared on behalf of the CLEC Coalition; and Joe Shirley, Esq. appeared on behalf of the CAPD. At the outset of the hearing Ms. Phillips stated BellSouth's request that the *Tariff*, as revised and filed on February 21, 2003, be substituted for the version of the *Tariff* that was allowed to go into effect after the February 3, 2003 Authority Conference and that the *Tariff* be approved in its latest form.<sup>31</sup> Ms. Phillips also clarified that the *Tariff* allows resellers to offer the program to existing BellSouth customers.<sup>32</sup> Thereafter, Ms. Phillips presented BellSouth's argument that all remaining issues in this Docket center around whether BellSouth may exclude existing customers from the program offered by the *Tariff* and BellSouth's position that the business opportunities presented by new customers are different from the business opportunities presented by existing customers and that this distinction justifies restricting the *Tariff's* offer to new customers.<sup>33</sup>

Mr. Walker appeared on behalf of the CLEC Coalition and acknowledged that the third revision to the *Tariff* represented a "substantial improvement over" the *Tariff* as originally

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<sup>29</sup> *CAPD Response*, p. 9 (February 25, 2003).

<sup>30</sup> filed on February 28, 2003.

<sup>31</sup> Transcript of Authority Conference, p. 48 (March 3, 2003).

<sup>32</sup> *Id.*, p. 50 (March 3, 2003).

<sup>33</sup> *Id.*, pp. 51-57 (March 3, 2003).

submitted.<sup>34</sup> However, Mr. Walker pointed out the CLEC Coalition's continuing objection to excluding a service provider's existing customers from the *Tariff* and argued that the only reason the *Tariff* is structured to exclude these existing customers is to harm competitors.<sup>35</sup> Mr. Walker concluded by arguing that the third revision of the *Tariff* creates price discrimination between similarly situated customers and that such is an anti-competitive practice that ought to be considered in a contested case.<sup>36</sup>

Mr. Shirley on behalf of the CAPD also acknowledged that BellSouth's clarification that resellers are able to offer the *Tariff* to customers who are not currently the resellers' customers, including customers gleaned from BellSouth's existing customer base, does mitigate some of the issues previously raised by the CAPD.<sup>37</sup> Mr. Shirley specifically acknowledged that the third revision to the *Tariff* addressed the CAPD's previously-raised concerns regarding resale of the *Tariff* at the wholesale discount rate and the CAPD's previously-raised concerns about a price squeeze.<sup>38</sup> Mr. Shirley reiterated the CAPD's concerns about unjust discrimination against BellSouth's existing customers and the existing customers of other telephone service providers.<sup>39</sup> Mr. Shirley also reiterated the CAPD's concerns that the *Tariff* creates an unreasonable restriction on resale because existing customers are excluded from it.<sup>40</sup> Mr. Shirley concluded by pointing out that the CAPD's concerns regarding long-term service commitments and termination liabilities were not satisfied by the third revision to the *Tariff*.<sup>41</sup>

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<sup>34</sup> Transcript of Authority Conference, p. 59 (March 3, 2003).

<sup>35</sup> *Id.*, p. 62 (March 3, 2003).

<sup>36</sup> *Id.*, p. 64, 77-78, 81 (March 3, 2003).

<sup>37</sup> *Id.*, p. 65 (March 3, 2003).

<sup>38</sup> *Id.* Later in the hearing and in response to a question from Director Jones, Mr. Shirley also acknowledged that the CAPD's concern regarding whether the *Tariff* unreasonably inflates customer acquisition costs of competing carriers was significantly mitigated by the third revision to the *Tariff*.

<sup>39</sup> Transcript of Authority Conference, p. 65, 82, 85-86 (March 3, 2003).

<sup>40</sup> *Id.*, p. 68, 76-77 (March 3, 2003).

<sup>41</sup> *Id.*, p. 69 (March 3, 2003).

## **Findings**

Authority Rule 1220-1-2.02 states

(4) A tariff filing does not constitute a contested case; however, any interested person may object to the tariff filing by filing a complaint. Any such complaint shall state the nature of the interest, the grounds for any such objection and the relief sought. A copy of the complaint shall be served on the company filing the tariff. The company filing the tariff shall have the right to respond to such complaint. It shall be within the discretion of the Authority to convene a contested case. A complaint opposing the tariff shall be filed no later than seven (7) days prior to the Authority Conference immediately preceding the proposed effective date of the tariff.

(5) If the Authority determines, on its own motion, not to convene a contested case in response to a complaint or initial petition, the Authority shall enter an order dismissing the complaint or petition and state the basis of the Authority's action.

Authority Rule 1220-4-8-09(2)(b) states

Upon the complaint of any interested party that any telecommunications service provider has violated any of the anti-competitive or discriminatory rate prohibitions found in applicable rules or statutes, the Commission shall investigate the complaint and may convene a contested case proceeding if such complaint is found to have merit. However, the complaining party must allege with specificity the action by telecommunications service provider that appears to be in violation of said prohibitions or the complaint is subject to dismissal by the Commission.

The Authority has conducted the investigation into the merits of the *Petition* and the *Intervention* required by TRA Rule 1220-4-8-09(2)(b) through consideration of the filings of the parties in this docket and through consideration of the statements of the parties at Authority Conferences held on February 3, February 18, and March 3, 2003. The Parties have acknowledged that the central issue in this docket centers on the claim that there is no valid distinction between new and existing customers and that such a distinction creates unjust discrimination and/or unreasonable restrictions on resale. The Authority finds this claim to be without merit.

The distinctions between new and existing customers are readily apparent and do not require a contested case to become clearer. BellSouth has pointed to differences between these two customer types including differences in terms of the costs of marketing efforts directed to each and in terms of business opportunities presented by each.<sup>42</sup> When addressing the practice of charging different rates to railroad passengers the Tennessee Supreme Court explained that “any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge.”<sup>43</sup> The differences in marketing costs and business opportunities noted above demonstrate inequalities of condition between new and existing customers.

A new customer for resale purposes is defined as any business customer not currently subscribing to services from the telephone service provider. New customers, as described in the *Tariff*, and existing customers are not similarly situated and therefore limiting this specific offering to new customers is not unjustly discriminatory and does not violate Tenn. Code Ann. § 65-4-122.

The Authority finds that the third revision to the *Tariff* renders it a long-term promotion. The Authority finds further that the one-year term contract requirement and its corresponding termination liability provision contained in the *Tariff* is not anti-competitive and is consistent with previous Authority rulings.

Issues regarding the creation of a price squeeze were removed with the filing of the third revision to the *Tariff*.<sup>44</sup> The Authority also finds that, to the extent that other claims raised by the CLEC Coalition and the CAPD have not been specifically acknowledged as moot subsequent to

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<sup>42</sup> See Reply of BellSouth Telecommunications, Inc. to Comments Regarding Substitute Tariff, pp. 4-6 (February 28, 2003).

<sup>43</sup> *Southern Ry. Co. v. Pentecost*, 330 S.W.2d 321, 325, 205 Tenn. 716 (Tenn. 1959) quoting *Interstate Commerce Comm'n v. Baltimore & Ohio R. Co.*, 145 U.S. 283, 284 12 S.Ct. 844, 850, 36 L.Ed. 699 (1892).

<sup>44</sup> See Transcript of Authority Conference, pp. 50, 60, 65 (March 3, 2003).

the third revision to the *Tariff*, the remaining claims raised by the CLEC Coalition and the CAPD are without merit and should be dismissed.

To the extent that the third revision to the *Tariff* is subject to the 30-day notice requirement contained in TRA Rule 1220-4-1.04, the notice requirement should be waived given the ongoing notices the parties to this Docket have received regarding revisions to the *Tariff* through BellSouth's filings in this Docket.

The *Tariff* as revised by BellSouth's filing of February 21, 2003, the *Petition*, and the *Intervention*, were considered at the regularly scheduled Authority Conference held on March 3, 2003. Attorney Joelle Phillips appeared on behalf of BellSouth, Henry Walker, Esq. of Boulton, Cummings, Conners & Berry, PLC appeared on behalf of the CLEC Coalition, and Joe Shirley, Esq. appeared on behalf of the CAPD. The Directors heard from the parties on the issues raised by the various filings in this Docket. Thereafter, a majority<sup>45</sup> of the Directors on the panel voted to dismiss the *Petition* and the *Intervention* and to waive the thirty-day notice requirement of TRA Rule 1220-4-1.04.


**IT IS THEREFORE ORDERED THAT:**

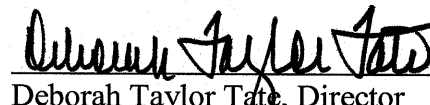
1. The *Petition to Suspend Tariff and Open a Contested Case Proceeding* filed by the CLEC Coalition and the *Complaint and Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General are denied,
2. The requirement that all tariffs or supplements thereto containing any change in rates, tolls, or charges or rules and regulations must be filed with the Authority at least (30) days before the effective date of such changes is hereby waived, and

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<sup>45</sup> Director Ron Jones declined to vote with the Majority.

3. BellSouth Telecommunications, Inc.'s *Tariff to Introduce the BellSouth Welcoming Reward Program*, as revised by BellSouth Telecommunications, Inc.'s filing of February 21, 2003, shall be allowed to go into effect per its stated effective date.<sup>46</sup>

  
Sara Kyle, Chairman

  
Deborah Taylor Tate, Director

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Ron Jones, Director

<sup>46</sup> On March 5, 2003 BellSouth filed a final revision to the *Tariff* consistent with its agreement to insert clarifying language into the *Tariff* stated during the March 3, 2003 Authority Conference whereby it inserted language clarifying that the *Tariff* will permit a reselling CLEC to resell the promotion to "new" business customers, from the CLEC's perspective. This revision thus clarifies BellSouth's intent to allow CLECs to sell the promotion to existing BellSouth customers who are new customers to the CLEC. The *Tariff*, as modified by BellSouth's March 5, 2003 filing, is otherwise identical to the version filed on February 21, 2003 and considered at the March 3, 2003 Authority Conference and is currently in effect per its effective date.